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FRIEDLANDER, Judge

Tyrone Hull appeals his conviction of Murder,¹ a felony, presenting the following restated issues for review:

1. Must the conviction be reversed because of an impermissibly suggestive out-of-court identification procedure?
2. Did the prosecuting attorney's comments during closing argument constitute prosecutorial misconduct that placed Hull in grave peril, thus warranting a new trial?

We affirm.

The facts favorable to the conviction are that thirty-seven-year-old Donald Bacon lived with his girlfriend, Detra Glasco and her sixteen-year-old daughter, D.G. Hull is D.G.'s favorite cousin. At some point, Glasco learned that Bacon had molested D.G. and kicked him out of her house. The molestation, however, was never reported to authorities. D.G. spoke with Hull about the molestation. Hull became angry and told D.G. that if he saw Bacon, something bad was going to happen. When Detra, who was Hull's aunt, became aware of Hull's anger over the incident, she advised him to "leave it alone." *Transcript* at 248. Hull got essentially the same advice from his Grandmother, MaryAnn Freeman, when Hull advised her that "he was gonna get [Bacon]." *Id.* at 266.

Freeman operated a daycare facility from her house, which was located on the west side of Capitol Avenue, across the street from where 24th Street intersects with Capitol from the east. One of Freeman's daycare clients was Lakeisha Humbert. Freeman had known Humbert "for a long time." *Id.* at 260. Humbert had grown up with

¹ Ind. Code Ann. § 35-42-1-1 (West, PREMISE through 2007 1st Regular Sess.).

Glasco and knew many members of Glasco's family, including Hull. Humbert had known Hull "all his life basically." *Id.* at 301. Humbert also knew Bacon, whom she called "Black." *Id.* at 313.

At approximately 3:00 p.m. on June 12, 2006, Humbert was pulling up to Freeman's house to pick up her children when she saw Bacon riding a bicycle nearby. She drove across Capitol and turned onto 24th Street, where she pulled next to the curb. Bacon rode his bicycle on the sidewalk on 24th Street and stopped next to Humbert's front passenger-side door. Humbert rolled down that window and the two began to converse. After they had talked for about five minutes, Humbert saw a white van drive by them on 24th Street, turn left onto Capitol, and then disappear. Five or ten minutes later, while Humbert and Bacon were still talking, the same white van appeared from the north on Capitol, turned left onto 24th Street, and stopped in the street before it pulled abreast of Humbert's parked vehicle. Humbert watched as Hull got out of the van armed with a rifle. Bacon saw Hull, too, and took off on his bicycle. Bacon had traveled only a few yards when Humbert saw Hull raise the rifle, aim it at Bacon, and fire. Humbert saw the bullet strike Bacon in the back of the head, and watched as he fell dead in a nearby driveway. Humbert drove away and was followed for a short distance by the white van, into which Hull had re-entered. When Humbert pulled into a parking lot a few blocks away, the white van drove on. After collecting her composure for a moment, Humbert drove back to Freeman's house.

George Freeman, MaryAnn's husband, had been lying upstairs in their home when he heard a single gunshot. He looked out a window and saw a young black male, who was carrying a rifle, getting into a white van. George saw something lying crumpled on the ground nearby and went outside to investigate. He passed his wife on the way outside and told her he thought someone had been shot. After he walked out into his yard, he learned that police had already been summoned, so he waited in his yard for police to arrive.

Meanwhile, Humbert returned to the Freemans' home. The police had already arrived on the scene by then. Humbert approached the Freemans, who were standing outside and watching the police activities. George observed that Humbert was "very upset," crying, and talking "quickly rapidly" to someone on her cell phone, "using profanity." *Id.* at 287. He heard her say "Tyrone shot Black boy." *Id.* at 288. She made another call, repeating the same message, and then started into the Freemans' house. George stopped her and asked her what she had said. According to George, "She said Tyrone shot Black boy. Well, she said Tyrone, Ms. Mary Ann's grandson."² *Id.* at 289.

Humbert was not at first inclined to talk with police, but one of the persons George overheard her talking to on the phone was her brother, William Humbert. William advised her to tell the police what she had seen. Humbert walked across the street and spoke with Detective Jessie Beavers. Humbert and Detective Beavers traveled to the

² MaryAnn Freeman is Hull's biological grandmother, but George Freeman is not Hull's biological grandfather.

police department, where Humbert gave a statement consistent with the information set out above. Although she had known Hull his whole life, she did not know his last name and therefore was not able to provide it to Detective Beavers. She explained at the subsequent trial, “I mean, the family, everybody have different last names. I didn’t really know what his last name was.” *Id.* at 322. Using the information Humbert had provided regarding the name “Tyrone” and the shooter’s age, Humbert ran a search in the police department’s computer database, resulting in 150 names. As Humbert looked on, the officer began showing photographs of the men whose names appeared on the list, one by one. As it turned out, Hull’s photograph was the second one to come up. Humbert immediately identified him as the shooter.

Hull was charged with murder on June 14, 2006. He was convicted as charged following a May 21-23, 2007 jury trial.

1.

Hull contends Humbert’s in-court identification of him was the product of an unduly suggestive out-of-court identification procedure and thus was invalid, warranting a new trial.

The identification of a defendant must comport with due process standards. *Dillard v. State*, 827 N.E.2d 570 (Ind. Ct. App. 2005), *trans. denied*. If an out-of-court identification procedure was unduly suggestive, as Hull contends occurred in the instant case, the testimony relating to it is inadmissible. *Id.* In assessing whether an identification procedure comported with due process standards, we examine the totality

of the circumstances to determine whether the identification process was conducted in such a manner that it created a substantial likelihood of irreparable misidentification. *Id.*

We note first that Hull did not object to the identification evidence at trial. As a result, he has waived consideration of any error resulting from admission of the in-court identification evidence by his failure to object at trial. *Carter v. State*, 754 N.E.2d 877 (Ind. 2001), *cert. denied*, 537 U.S. 831 (2002). Waiver notwithstanding, Humbert's pre-trial identification was not impermissibly suggestive so that it tainted her in-court identification. "A conviction based on eyewitness identification at trial following a pre-trial identification by photograph will be set aside on that ground only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of misidentification." *Miles v. State*, 764 N.E.2d 237, 240 (Ind. Ct. App. 2002), *trans. denied*. Yet, "regardless of error in pretrial identification procedures or their suggestiveness if there is sufficient basis for identification independent of the pretrial procedure, there is no error in permitting the in-court identification." *Terry v. State*, 857 N.E.2d 396, 410 (Ind. Ct. App. 2006) (quoting *Badelle v. State*, 754 N.E.2d 510, 538 (Ind. Ct. App. 2001), *trans. denied*), *trans. denied*. Under the traditional analysis, our Supreme Court has identified seven factors that are relevant to determining whether a witness has a sufficient independent basis:

[1] the amount of time the witness was in the presence of the perpetrator and the amount of attention the witness had focused on him, [2] the distance between the two and the lighting conditions at the time, [3] the witness's capacity for observation and opportunity to perceive particular characteristics of the perpetrator, [4] the lapse of time between the crime

and the subsequent identification, [5] the accuracy of any prior descriptions, [6] the witness's level of certainty at the pre-trial identification and [7] the length of time between the crime and the identification.

Wethington v. State, 560 N.E.2d 496, 503 (Ind. 1990) (citation omitted). “Furthermore, it is well settled that where a witness had an opportunity to observe the perpetrator during the crime, a basis for in-court identification exists, independent of the propriety of pre-trial identification.” *Adkins v. State*, 703 N.E.2d 182, 185 (Ind. Ct. App. 1998).

The application of the seven-factor test set out in *Wethington* leads to the conclusion that Humbert had an independent basis for her identification of Hull as the shooter. Humbert testified that Hull got out of the white van a little behind her vehicle, then walked past her driver's side window toward the victim. At the time, the sun was shining and Humbert “look[ed] at [Hull] in the face.” *Transcript* at 311. When asked whether she had, “any doubt whatsoever that the person that fired the gun that day was that [sic] defendant”, Humbert answered, “No.” *Id.* at 328. Humbert selected Hull's photo as that of the shooter within approximately two hours after the shooting occurred.

We note also that there is a factor present in the instant case that bolsters the reliability of Humbert's identification of Hull, but that is not included in the *Wethington* list. That factor is Humbert's pre-existing familiarity with Hull. Humbert testified that she had known Hull “his whole life,” *id.* at 322, and had last seen Hull “maybe two weeks” before the shooting. *Id.* at 347. When asked how many times she had been “around” Hull in her life, she responded, “Too many to count.” *Id.* at 349. Under these circumstances, the chance of misidentification was remote. There was no error here.

Referencing remarks made by the deputy prosecutor during closing argument at trial, Hull contends the State engaged in prosecutorial misconduct. Hull concedes that he did not object to the prosecutor's remarks, but contends they placed him in a position of grave peril thus justifying a new trial.

The proper course to follow when a defendant believes an improper argument was made is to request the trial court to admonish the jury. *Cooper v. State*, 854 N.E.2d 831 (Ind. 2006). If the defendant is not satisfied with the admonishment, then he or she should request a mistrial. *Id.* The failure to request an admonishment or to move for mistrial results in waiver. *Id.* Where a defendant has failed to preserve a claim of prosecutorial misconduct, we apply a different standard for review than is applicable for properly preserved claims. *Id.* When a claim was not properly preserved, the defendant must establish not only the grounds for the misconduct but also the additional grounds for fundamental error. *Id.*

As to the former, when reviewing a properly preserved claim of prosecutorial misconduct, we determine first whether the prosecutor engaged in misconduct, and if so, we determine whether the misconduct placed the defendant in a position of grave peril to which he or she would not have been subjected. *Id.* We determine whether a prosecutor's argument constitutes misconduct by reference to case law and the Rules of Professional Conduct. We measure the gravity of peril resulting therefrom by the

probable persuasive effect of the misconduct on the jury's decision, not by the degree of impropriety of the conduct. *Id.*

As to the latter element, i.e., fundamental error, when reviewing such a claim, we are mindful of our Supreme Court's observation that fundamental error in this context is "an extremely narrow exception". *Id.* at 835. It is defined as "error that makes 'a fair trial impossible or constitute[s] clearly blatant violations of basic and elementary principles of due process ... present[ing] an undeniable and substantial potential for harm.'" *Id.* (quoting *Benson v. State*, 762 N.E.2d 748, 756 (Ind. 2002)).

The comments to which Hull alludes are those highlighted in the following excerpt from the prosecuting attorney's closing argument:

We're here because the defendant's chosen to exercise his rights, rights that we're all given to come before a jury and present their case. He wasn't willing to do that. He wasn't willing to give Donald Bacon that chance to come before you. He took [the] law into his own hands. He appointed himself the police, the prosecutor, the Judge, and the executioner. He didn't give Donald Bacon the chance to defend himself against an allegation that wasn't even reported to law enforcement. He couldn't let it go. You heard the evidence. This case is about vengeance, and it's about him taking the law into his own hands. Tyrone Hull, if he would have let this case run it's [sic] normal course, Detra Glasco didn't even report it. If you heard the testimony, and you paid attention, nothing was even reported to the police. No allegation was ever put forward for somebody to look into. So other than Donald Bacon, and [D.G.], nobody knows what happened. But his closest cousin, [D.G.], he was checking to see if she was okay. He was upset. You heard the testimony. He was upset, and he wanted to do something about it. Donald Bacon is not on trial in this Court. He was never on trial in this Court, and he never will be in [sic] trial in this Court, because he wanted to take the law into his own hands, because he was the big man that day. *He's the one that brought you in here, brought all of us in here for this trial.* Just the mere definition of vengeance, infliction of punishment in return for wrongs committed, retribution, and

even that's not correct in this case, because it wasn't a wrong. It was a mere allegation that he took to heart and held against Donald Bacon.

Transcript at 780-82 (emphasis supplied).

Hull describes the grave peril to which he was allegedly subjected by the foregoing comments as follows: "Commenting upon the fundamental right of the Appellant to have jury trial forced the Appellant to bear the burden of the jury's service. This unfair burden occurring at a critical time in the jury's service ... created a position of grave peril for Tyrone Hull and requires reversal." *Appellant's Brief* at 6.

Examining the isolated remark of which Hull complains in the larger context in which it was made, we conclude the jury would not have understood it as a comment upon, much less a criticism of, Hull's invocation of his right to trial by jury. Rather, the comment was consistent with and underscored a main theme of the State's case concerning Hull's motivation, i.e., vigilante justice. We agree with the State's observation that, if anything, the comment conveyed the message that everyone, Bacon and Hull included, deserved the right to a trial by jury before guilt and punishment are determined. As such, the comment does not constitute error, much less fundamental error.

Judgment affirmed.

ROBB, J., and MATHIAS, J., concur.